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In the Supreme Court of the United States

OCTOBER TERM, 1975

ALTON D. WHITT,
Appellant-Petitioner

versus

ESTELLE MAE VAUTHIER,
Appellee-Respondent

ON APPEAL FROM THE LOUISIANA SUPREME COURT

BRIEF OF THE STATE OF LOUISIANA *Amicus Curiae* - OPPOSITION TO THE PETITION FOR CERTIORARI

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INTEREST OF *Amicus*

The State of Louisiana, by its Attorney General, submits this brief amicus curiae pursuant to Rule 42 (4) of the Rules of the Supreme Court of the United States. Louisiana Code of Civil Procedure, Article 1880 requires that ". . .if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard".

The constitutionality of at least one Louisiana Civil Code article has been raised by petitioner. Louisiana has a distinct and significant interest in preserving the rights and duties presently stated in the Civil Code regarding divorce. The State of Louisiana believes that its views are important to a full consideration of the questions presented by petitioner.

Although petitioner has named the State of Louisiana as an appellee-respondent, the lower court records indicate the State was not made a party to the proceedings, but was granted *amicus* status.

SUMMARY OF ARGUMENT

Petitioner has improperly questioned the constitutionality of Louisiana Civil Code Article 160 regarding the granting of alimony. Petitioner has not claimed that, but for Article 160, he would have received alimony himself, nor that he meets the gender-neutral requirements of Article 160, but merely seeks to terminate his own alimony obligations. In addition, recent decisions of this Court have recognized that state laws which seek to redress economic inequalities which affect women are constitutionally permissible.

Petitioner, after failing to invoke timely his right to a state court review of the alimony judgment, has also improperly questioned a long standing rule of Civil Code Article 232 which permits an increased award of, but not a diminution of, alimony retroactively. Appellant also does not satisfactorily justify the disregard of a Louisiana rule of law which is reasonable and based upon traditional state notions regarding divorce and alimony.

ARGUMENT

I. Louisiana Civil Code Article 160 does not discriminate in violation of the 5th and 14th Amendments to the Constitution of the United States.

A. Petitioner has not shown that he is precluded from receiving alimony under Article 160 and, therefore, fails to show a violation of equal protection and due process.

Petitioner has not made a claim that he would otherwise be entitled to receive alimony, but for the provisions of Article 160:

> Art. 160. When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when:
>
> 1. The wife obtains a divorce;
>
> 2. The husband obtains a divorce on the ground that he and his wife have been living separate and apart, or on the ground that there has been no reconciliation between the spouses after a judgment of separation from bed and board, for a specified period of time; or
>
> 3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person.
>
> This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries. (*As amended Acts 1964, No. 48,§ 1.)*

In fact, the Louisiana Fourth Circuit Court of Appeals said that:

> . . . .the courts may, in the appropriate case. . . . award alimony to a divorced husband, and therefore the existence of Article 160 which codifies the right of the divorced wife in this connection is not unconstitutional because it neglects to codify a similar right to divorced husbands. 316 So. 2d 202, 205.

Therefore, petitioner cannot show an unequal application of Article 160. Nor can he show the provision has harmed him in such a way as to allow him to raise the constitituional question because he himself makes no claim for alimony, but merely seeks not to pay it. Nor has petitioner shown that the state's purposes for granting alimony are arbitrary and without foundation. Petitioner has improperly raised the constitutional questions presented and his petition for certiorari should be denied.

B. Petitioner has not shown that, but for the Article's references to "wife", he would have come within the ambit of Article 160, and, therefore, impermissibly raises a constitutional question.

Petitioner has not alleged that, but for the Article's references to "wife", he would have complied with all other conditions for the granting of alimony. Article 160 requires the appellant to at aleast allege that the divorce was granted solely on the ground that the married persons have been living separate and apart for a certain specified period of time, and the wife has obtained a divorce upon the ground of such living separate and apart, and that the husband has not been at fault. More importantly, however, petitioner has not stated that he ". . . .has not sufficient means for [his] support. . . .". The allegation of need is crucial to the invocation of Article 160 relief. Louisiana has a long standing history requiring proof of need prior to the receipt of Article 160 alimony. *Bocage v. Lombard*, 144 La. 1005, 81 So. 604 (1919); *Scacciaferro v. Hymel*, 206 La. 973, 20 So. 2d 284 (1944); and *Rabun v. Rabun*, 232 La. 1004, 95 So. 2d 635 (1957). Without a showing that petitioner has made the required allegations, he could not claim alimony under Article 160 regardless of the provision's references to sex.

Appellant has improperly raised the constitutional question.

C. Recent decisions of this Court indicate that state law which seeks to redress economic irregularities affecting women is constitutionally permissible.

Recent decisions of this Court have recognized that " . . . men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support". *Weinberger v. Wisenfeld*, 420 U.S. 636, 645 (1975). These decisions have also recognized that ". . . .the job market is inhospitable to the woman seeking any but the lowest paid jobs". *Kahn v. Shevin*, 416 U.S. 351, 353 (1974). The Louisiana codal article seeks only to assist a spouse whose earning capacity is limited and, because wives have traditionally been that class of spouse, Louisiana has treated dissimilarly situated classes dissimilarly, a practice sanctioned by this Court. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

II. Louisiana rule that while alimony may be retroactive, modifications of alimony may not be retroactive does not violate 5th or 14th Amendments to the United States Constitution.

A. Petitioner has improperly raised the constitutional question.

The Louisiana Fourth Circuit Court of Appeals found that appellant had waited too long before raising the question of an alimony reduction prior to the time the judgment became final and appeals had been exhausted, and therefore, decided that petitioner was precluded from raising the question later.

> We think it significant that although the opinion in the last case between these parties was handed down in February, 1974, a rehearing was not denied until June, 1974. Nothing precluded the husband from then bringing to this Court's attention the fact that his former wife was employed during that period and had he done so this Court may have remanded the case to the trial court for the taking of evidence and an appropriate award based on the circumstances then prevailing. Instead, our judgment became final and was thereafter immune to any amendment by the trial court.
> 316 So. 2d 202, 206-7.

So too, petitioner is precluded from raising the constitutional issue in this Court.

B. Louisiana courts may not modify accrued alimony because it is a vested right.

This Court has recognized that ". . . .where a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming due . . . .". *Sistare v. Sistare*, 218 U.S. 1, 16-7 (1910). Louisiana has a long standing rule of law that alimony which is already due and owing is a vested right and cannot be modified, although future alimony installments may be altered upon a showing of changed circumstances. C.C. Article 232; *Pisciotto v. Crucia*, 224 La. 862, 71 So. 2d 225 (1954); *Wright v. Wright*, 189 La. 539, 179 So. 866 (1938). Petitioner has not satisfactorily shown or postulated why this long standing rule is unreasonable or arbitrary, and the rule should therefore stand.

CONCLUSION

The *amicus* urges that this Court affirm the decision of the lower court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of the State of Louisiana, *Amicus Curiae* Opposition to the Petition for Certiorari has been served on opposing counsel, this day of February, 1976.

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